

IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

YESENIA PACHECO, LUIS LEMUS, and  
S.L.P. , minor child,  
by and through her Guardian ad Litem  
Brian Comfort.

NO 2:15-cv-01175

**Plaintiffs,**

## COMPLAINT FOR DAMAGES

vs.

UNITED STATES OF AMERICA.

## Defendants.

Plaintiffs allege:

## JURISDICTION AND VENUE

1.1 This action is brought pursuant to the authority of the Federal Tort Claims Act, Title 28, §§2671 et seq., and Title 28, §1346(b) of the United States Code.

1.2. Pursuant to 28 USC § 2672 and 2675(a) Plaintiffs timely filed and presented administratively a claim for damages on standard form 95 to Defendant's agency the United States Department of Health and Human Services . The United States Department of Health and Human

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1 Service has failed to resolve the claim. Thus, the option to file suit has now accrued and this action has  
2 been commenced with the time limits established by the Federal Tort Claims Act.

3           1.3 Plaintiffs have complied with all procedures as required by the Federal Tort Claim Act, Title  
4  
5           28, §§2671, et seq. and Title 28, §1346 (b) of the United States Code, and this matter is ripe for filing.

6           1.4 Venue is proper in the above-captioned District Court pursuant to 28 USC § 1331(e)  
7  
8 due to the acts and omissions of employees of defendant described below in the above- captioned  
9 judicial district.

10           1.5 The United States of America may be served with process in accordance with Rule  
11           4(1) of the Federal Rules of Civil Procedure by serving a copy of the Summons and of the  
12           Complaint on Annette L. Hayes, US Attorney, by certified mail, return receipt requested at the  
13           office, United States Government c/o US Attorney's Office, 700 Stewart St #5220, Seattle,  
14           Washington 98101-1271, to the attention of the Civil Process Clerk, and by serving a copy of the  
15           Summons and Complaint on Loretta Lynch, Attorney General of the United States, by certified  
16           mail, return receipt requested, at the Office of the General Counsel, General Law Division,  
17           Claims & Employment Law, Wilbur J. Cohen Building, Room 4760, 330 Independence Ave  
18           SW, Mail stop Capitol Place, Washington, D.C. 20201, to the attention of the Civil Process  
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21  
22

## II. PARTIES

25        2.1 Plaintiff Yesenia Pacheco was at all times relevant to this action a patient of  
26        Defendant through NeighborCare Health at 1629 North 45th Street, Seattle, Washington.

2.2 Plaintiff Luis Lemus was at all times relevant to this action was the paramour of

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1 Plaintiff Yesenia Pacheco.

2 2.3 S.L.P. was at all times relevant to this action the daughter of Plaintiff  
3 Yesenia Pacheco and Luis Lemus. Brian Comfort was appointed Guardian ad Litem of S.L.P.  
4 under Pierce County Cause Number 13-2-13239-2.

5 2.4 NeighborCare Health is a Federally Qualified Community Health Center located  
6 within the territorial jurisdiction and venue of the above-captioned District Court. At all relevant  
7 times, it employed persons who treated plaintiff as health care providers, who treated Plaintiff  
8 Yesenia Pacheco, and who acted on behalf of the United States in providing such treatment and  
9 within the scope of their employment.

10 **III. FACTS**

11 3.1 On December 3, 2009, Plaintiff Yesenia Pacheco visited NeighborCare Health in  
12 order to discuss options regarding birth control methods. Plaintiff Yesenia Pacheco desired to  
13 prevent the birth of an unwanted child.

14 3.2 On December 8, 2009, Plaintiff Yesenia Pacheco visited NeighborCare Health and  
15 received a Depo-Provera Injection.

16 3.3 Depo-Provera is a birth control method for women that must be administered once  
17 every three months.

18 3.4 On March 8, 2010 Plaintiff Yesenia Pacheco visited NeighborCare Health and  
19 received a Depo-Provera injection.

20 3.5 On May 11, 2010 Plaintiff Yesenia Pacheco visited NeighborCare Health for an  
21 emergency pregnancy test. Plaintiff Pacheco had unprotected sex less than 24 hours prior. She

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1 took Plan B, an emergency birth control medication. Although the Clinic's medical doctor  
2 reviewed birth control options, there was no discussion of a birth control plan.

3       3.6 On January 24, 2011 Plaintiff Yesenia Pacheco was seen at NeighborCare Health.  
4  
5 She received a Depo-Provera injection. There was no chart note documenting the administering  
6 of the Depo-Provera injection.

7       3.7 On April 12, 2011, Plaintiff Yesenia Pacheco was seen at NeighborCare Health for a  
8 Depo-Provera injection. There was a chart note documenting the administering of the Depo-  
9 Provera injection.

10      3.8 On June 22, 2011, Plaintiff Yesenia Pacheco was seen at NeighborCare Health for  
11 low back pain headaches and other medical issues. The chart note on this visit does not state that  
12 she was receiving Depo-Provera injections.

13      3.9 On July 5, 2011 Plaintiff Yesenia Pacheco was seen at NeighborCare Health for a  
14 Depo-Provera injection. There was no chart note documenting the administering of the Depo-  
15 Provera injection.

16      3.10 On September 30, 2011 Plaintiff Yesenia Pacheco treated at NeighborCare Health  
17 for a scheduled Depo-Provera injection. She did not receive a Depo-Provera injection. She  
18 received two injections: a Influenza Vaccine and an Immunization Vaccine. There was no chart  
19 note documenting the administering of the aforementioned injections.

20      3.12 On October 11, 2011, Plaintiff Yesenia Pacheco was seen at NeighborCare Health  
21 for vaginal discharge and a Urinary Tract Infection (UTI). The chart note on the aforementioned  
22 visit does not state that she was receiving periodic Depo-Provera injections.

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3.13 On December 13, 2011, while Plaintiff Yesenia Pacheco was at NeighborCare  
1 Health Center, she scheduled an appointment for her next Depo-Provera injection. On that day,  
2 Plaintiff Pacheco was informed that on September 30, 2011 she did not receive Depo-Provera  
3 injection but a “Flu-Shot” instead.  
4

6           3.14 On December 14, 2011, Plaintiff Yesenia Pacheco visited NeighborCare Health for  
7 a pregnancy test. The pregnancy test was positive. The clinic's medical doctor noted that a "Flu-  
8 Shot" was administered instead of the Depo-Provera injection. The doctor also stated that she  
9 was unclear as to how the "miscommunication" occurred.  
10

3.15 On May 10, 2012, Plaintiff Yesenia Pacheco was diagnosed with Gestational  
Diabetes.

14           3.16 Throughout the pregnancy, Plaintiff Yesenia Pacheco experienced low back pain,  
15           worry and depression.

17           3.17 On August 2, 2012, Plaintiff Yesenia Pacheco delivered, by Emergency Cesarean  
18 Section, S.L.P. at 39 weeks and 4 days. Plaintiff S.L.P. developed clinical  
19 seizure activity involving convulsive movements of her right side for which she was  
20 administered phenobarbital.  
21

22 ||| 3.18 Plaintiff Luis Lemus is the natural father of Plaintiff S.L.P.

3.19 On August 6, 2012, Plaintiff S.L.P. underwent a Brain MRI scan  
which revealed unilateral perisylvian polymicrogyria (PMG) involving the left posterior frontal  
and perisylvian region of the brain. Plaintiff S.L.P. remained hospitalized from  
the date of her birth, August 2, 2012 to August 12, 2012.

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3.20 Because of the left perisylvian PMG, Plaintiff S.L.P. 's motor skills, speech and language skills, attention span and cognitive functions have been negatively impacted. Plaintiff S.L.P. will require special education and physical therapy to help her with her development.

3.21 PlaintiffS.L.P. will have diminished motor skills, speech and language skills, attention span and cognitive functions after she turns 18 years old

3.22 NeighborCare Health is an agency of the United States of America. The United States of America, Defendant herein, through its agency, NeighborCare Health, at all times material hereto, owned, operated, and controlled the health care facility known as NeighborCare Health, located in Seattle, Washington. NeighborCare Health, staffed said health care facility with its agents, servants and/or employees. All the personnel who were involved in the care of Plaintiff Yesenia Pacheco since December 2009, including Dr. Allison Fitzgerald, M.D., Dr. Wendy Johnson, M.D., Cheryl Smally, ARNP and medical assistants were in the employment of Defendant and acted as agents of Defendant.

#### **IV. CAUSES OF ACTION**

**4.1 This is a Federal Tort Claims Action for monetary damages sustained by Plaintiff Yesenia Pacheco, Plaintiff Luis Lemus and PlaintiffS.L.P. resulting from personal injuries each sustained as a result of the negligence of the employees at NeighborCare Health Center in preventing an unwanted pregnancy.**

4.2 By failing to administer the Depo-Provera injection to Plaintiff Yesenia Pacheco, NeighborCare Health failed to exercise that degree of care, skill, and learning expected of

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1 reasonably prudent health care providers at the time in the profession or class to which they  
2 belonged, in the State of Washington acting in the same or similar circumstances.

3       4.3 NeighborCare Health's employees negligently failed to maintain adequate charting  
4 and documentation of Plaintiff Yesenia Pacheco's medications, which included Depo-Provera.  
5 The failure to document in her medical records that Plaintiff Yesenia was receiving Depo-  
6 Provera caused the health care provider to not administer Depo-Provera on September 30, 2011.  
7 By failing to adequately chart and document that Plaintiff Yesenia Pacheco was receiving Depo-  
8 Provera injections, NeighborCare Health failed to exercise that degree of care, skill, and learning  
9 expected of reasonably prudent health care providers at the time in the profession or class to  
10 which they belonged, in the State of Washington acting in the same or similar circumstances.  
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12       4.4 NeighborCare Health's employees negligently failed to adequately chart and  
13 document what Plaintiff Yesenia Pacheco was doing for contraception and when her last  
14 menstrual period had occurred. By failing to adequately chart and document what Plaintiff  
15 Yesenia Pacheco was doing for contraception and when her last menstrual period had occurred,  
16 NeighborCare Health failed to exercise that degree of care, skill, and learning expected of  
17 reasonably prudent health care providers at the time in the profession or class to which they  
18 belonged, in the State of Washington acting in the same or similar circumstances.  
19

20       4.5 NeighborCare Health's employees negligently failed to maintain adequate charting  
21 and documentation of the medications that were administered to Plaintiff Yesenia Pacheco,  
22 which included Depo-Provera on January 24, 2011, April 12, 2011 and July 5, 2011. By failing  
23 to adequately chart and document the medications that were administered to Plaintiff Yesenia  
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Pacheco, NeighborCare Health failed to exercise that degree of care, skill, and learning expected of reasonably prudent health care providers at the time in the profession or class to which they belonged, in the State of Washington acting in the same or similar circumstances.

4.6 Such failures stated above were proximate causes of Plaintiff Yesenia Pacheco's unwanted pregnancy and giving birth to Plaintiff S.L.P. , who was born with a brain malformation, unilateral perisylvian polymicrogyria.

## V. DAMAGES

5.1 As a direct and proximate result of Defendant's negligent acts and/or omissions to perform the medical care with due care, Plaintiff Yesenia Pacheco and Plaintiff Luis Lemus have incurred medical bills and bills for treatment, other damages and is entitled to recover for pain and suffering, and the full value of all other categories of damages permissible by law due to the unwanted pregnancy.

5.2 As a direct and proximate result of Defendant's negligent acts and/or omissions to perform the medical care with due care, Plaintiff Yesenia Pacheco and Plaintiff Luis Lemus gave birth to Plaintiff S.L.P. who has a brain malformation, unilateral perisylvian polymicrogyria which will require medical bill and bills for treatment, other damages and is entitled to recover for pain and suffering, and the full value of all other categories of damages permissible by law.

5.3. As a direct and proximate result of Defendant's negligent acts and/or omissions to perform the medical care with due care, Plaintiff S.L.P. sustained a wrongful life which will require medical bill and bills for treatment, other damages and is entitled to

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recover for pain and suffering, and the full value of all other categories of damages permissible by law.

## VI. RELIEF

**WHEREFORE**, the Plaintiff prays as follows:

1. For judgment in favor of Plaintiffs and against the Defendant;
  2. For an award of damages in favor of the Plaintiffs and against the Defendant in amounts to be proven at the time of trial;
  3. For an award of prejudgment interest at the statutory rate on Plaintiffs economic damages;
  4. For an award of prejudgment interest on Plaintiffs' non-economic damages to the extent allowed by law;
  5. For an award of Plaintiffs costs and disbursements herein'
  6. For an award of attorney's fees and
  7. For such further relief as the Court deems just.

DATED this 23rd day of July, 2015.

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STEVE R. ALVAREZ, WSBA # 23051  
Attorney for Plaintiffs

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1 DATED this 23 day of July, 2015  
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4 MAXWELL GRAHAM, PS  
5  
6

7 By: 

8 MICHAEL A. MAXWELL-WSBA # 21781  
9 Attorney for Plaintiffs  
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